

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

IN RE: PROPULSID	:	MDL NO. 1355
PRODUCTS LIABILITY LITIGATION	:	SECTION "L"
	:	
	:	JUDGE FALLON
.....	:	

THIS DOCUMENT RELATES TO CIVIL ACTION NO. 00-2787

ORDER & REASONS

Before the Court is the motion of defendant Rite Aid of West Virginia, Inc. ("Rite Aid") [Document # 627] in consolidated civil action No. 00-2787 captioned *Lisa Skeens, et al. v. Johnson & Johnson, et al.* In its motion, Rite Aid seeks dismissal of all claims asserted against it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For reasons set forth below, the motion is GRANTED. Accordingly, all claims asserted against defendant Rite Aid of West Virginia, Inc. are DISMISSED WITH PREJUDICE.

I. Background

This litigation concerns the alleged harmful side-effects of the prescription drug Propulsid which was developed, manufactured, and distributed by Johnson & Johnson, Co. and its wholly owned subsidiary, Janssen Pharmaceutica, Inc. In this consolidated case plaintiff has named as defendants both the manufacturers of the drug as well as Rite Aid of West Virginia, Inc., whose pharmacies allegedly sold Propulsid to the plaintiffs.

This case was initially filed on June 28, 2000 in the Circuit Court of Mingo County, West Virginia. Johnson & Johnson and Janssen removed this action to federal court in West Virginia with the consent of Rite Aid. While the case was pending there, it was transferred to this court to be consolidated with *In re Propulsid Products Liability Litigation* MDL-1335 on September 14, 2000.

In their complaint, plaintiffs allege that the prescription drug Propulsid carries the risk of serious side effects including heart rhythm disorders, such as ventricular tachycardia, ventricular fibrillation, torsades de point and QT prolongation. Plaintiffs contend that they have suffered physical and emotional damages from their use of the drug and assert numerous theories of liability against Johnson & Johnson and Janssen including strict liability, breach of warranty, breach of implied warranty, deceptive practices, negligence, malicious conduct, and medical monitoring. In the complaint, the defendant pharmacies are mentioned by name only in the jurisdictional and venue statements and again in the prayer for relief. Plaintiffs assert no basis for the relief against defendant Rite Aid. In fact, Paragraph 34 of the complaint states only that "The conduct of [Johnson & Johnson] set forth above is

a legal cause of the harm sustained by the Plaintiffs." Defendant Rite Aid now brings this motion under Rule 12(b)(6) to dismiss for failure to state a cause of action.

II. Analysis

The Federal Rules of Civil Procedure permit a defendant to seek dismissal of a complaint based on the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the plaintiff, assuming all factual allegations to be true. *See Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)).

West Virginia law provides that "[a]ll persons, whether licensed pharmacists or not, shall be responsible for the quality of all drugs, chemicals and medicines they may sell or dispense, with the exception of those sold in or dispensed unchanged from the original retail package of the manufacturer, in which event the manufacturer shall be responsible." W. VA. CODE § 30-5-12. Plaintiffs have failed to set forth any facts alleging that the defendant Rite Aid changed, in any form, the original retail packaging of the manufacturer. Therefore, plaintiffs fail to state a cause of action upon which relief may be granted.

III. Conclusion

For the reasons set forth above, the motion of defendant Rite Aid of West Virginia, Inc. is GRANTED. Accordingly, all claims against Rite Aid of West Virginia, Inc. in this matter are hereby DISMISSED WITH PREJUDICE.

New Orleans, Louisiana this 27th day of August, 2002

_____/s/ Eldon E. Fallon_____
UNITED STATES DISTRICT JUDGE